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# Quarantine: Legal Reform for 21st Century Crises

Joseph M. Pennell

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## Abstract

Legal authority for quarantine predates the American Revolution, and was implicitly authorized by the Constitution. State and federal quarantine law remained static during the latter half of the 20th century despite expansive interpretations of procedural due process rights. After the events of September 11, 2001 and the subsequent anthrax murders, lawmakers and academics began developing new laws and regulations to address threats such as bioterrorism and pandemic disease. The sweeping powers of these new laws and regulations faced harsh criticism from civil libertarians. This paper discusses legal authority for quarantine up through the early 20th century, the 20th century Supreme Court jurisprudence limiting future quarantine powers, the post-9/11 attempts to reform state and federal quarantine law, and the criticism those attempts have faced.

## Historical Foundations of Quarantine Law

Separating diseased individuals from the larger population is a practice at least as ancient as the Old Testament, which describes procedures for identifying and isolating lepers.<sup>1</sup> During the plague epidemics of the late Middle Ages and early Renaissance, merchant vessels were forced to anchor outside Italian ports for forty days to identify any latent contagion. The Italian word for these forty days of isolation was *quarantenaria*, which became the foundation of the English word “quarantine.”<sup>2</sup>

Quarantine practices in America began at least as early as 1647, when the Massachusetts Bay Colony blocked vessels from the West Indies during a plague outbreak.<sup>3</sup> Quarantine was generally considered a function of state and local government, but the U.S. Constitution’s Commerce Clause<sup>4</sup> granted Congress authority over state quarantine laws “for the regulation of commerce.”<sup>5</sup>

## Quarantine Jurisprudence: Pre-Warren Court

Until the mid-20th century, quarantine powers were frequently exercised to combat a variety of epidemics,<sup>6</sup> and courts generally showed significant deference to the

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<sup>1</sup> *Leviticus* 14:4-8 and *Numbers* 5:2; LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 204-5 (2002).

<sup>2</sup> Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA LAW REVIEW 53, 55 (1985) (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1175 (unabr. ed. 1967) and W. MCNEILL, PLAGUES AND PEOPLES 151 (1976)).

<sup>3</sup> Kathleen S. Swendiman & Jennifer K. Elsea, *Federal and State Quarantine and Isolation Authority*, CRS Report RL33201, at 1 (Jan. 23, 2007).

<sup>4</sup> U.S. CONST. art I, § 8.

<sup>5</sup> *Gibbons v. Ogden*, 22 U.S. 1, 205-06 (1824).

<sup>6</sup> See, e.g., *Varholy v. Sweat*, 15 So. 2d 267 (Fla. 1943)(venereal disease); *Kirk v. Wyman*, 65 S.E. 387 (S.C. 1909)(leprosy); *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900)(bubonic plague); *Hengehold v. City of Covington*, 57 S.W. 495 (Ky. 1900)(smallpox); *Rudolphe v. City of New Orleans*, 11 La. Ann. 242 (L.A. 1854)(cholera); *In re Martin*, 188 P.2d 287 (Cal. Ct. App. 1948)(venereal disease); *Illinois v. Tait*, 103 N.E. 750 (Ill. 1913)(scarlet fever); *In re Halko*, 54 Cal. Rptr. 661 (Cal. Ct. App. 1966)(tuberculosis).

judgment of state and local officials ordering these measures.<sup>7</sup> Plaintiffs often alleged that state officials acted beyond the scope of their delegated authority.<sup>8</sup> Many plaintiffs demanded economic damages in connection with state action against their property,<sup>9</sup> as opposed to damages for unconstitutional deprivation of personal liberty.<sup>10</sup>

The Modern Legal Foundation for Quarantine: *Jacobson v. Massachusetts*

*Jacobson v. Massachusetts* is the seminal case delineating the state's broad authority to curtail individual liberty in furtherance of the public good.<sup>11</sup> Reverend Henning Jacobson, a Swedish immigrant and community leader, had refused compulsory vaccination for smallpox and was fined five dollars pursuant to a state statute.<sup>12</sup> After concluding that the compulsory vaccination law had a real and substantial relation to protecting the public's health, the Court rejected Jacobson's claim that he had been unconstitutionally deprived of his liberty.<sup>13</sup>

The Court's holding established a reasonableness test that continues to apply to public health law (including quarantine law): "[T]he police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative

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<sup>7</sup> See Parmet, *AIDS and Quarantine*, *supra* note 2, at 62-66; David P. Fidler et al., *Through the Quarantine Looking Glass: Drug-Resistant Tuberculosis and Public Health Governance, Law, and Ethics*, J.L. MED. & ETHICS, 616, 621 (Winter 2007) ("This jurisprudence reveals deference by the courts, which usually regarded isolation or quarantine actions as presumptively valid."); Swendiman & Elsea, *Federal and State Quarantine and Isolation Authority*, *supra* note 3, at 13-14 (courts reluctant to interfere with public health police powers unless the adopted regulations are "arbitrary, oppressive, and unreasonable.") (quoting *People ex rel. Barmore v. Robertson* 134 N.E. 815, 817 (Ill. 1922) (citations omitted)).

<sup>8</sup> See, e.g., *Illinois v. Tait*, 103 N.E. 750 (Ill. 1913) (conviction for violation of quarantine order upheld).

<sup>9</sup> See, e.g., *White v. City of San Antonio*, 60 S.W. 426 (Tex. 1901) (denying hotel owner's damages claim for lost business when city quarantined Yellow Fever victims in hotel); *Allison v. Cash*, 137 S.W. 245 (Ky. 1911) (holding that destruction of store owner's inventory during necessary fumigation was legal, and that closure of plaintiff's store during smallpox inquiry was not a taking entitled to just compensation).

<sup>10</sup> See Parmet, *AIDS and Quarantine*, *supra* note 2, at 60 n. 46 (noting that courts were unsympathetic to individual rights claims "that could not be reduced to freedom of contract," and that plaintiffs "faced insurmountable procedural difficulties" before *Monroe v. Pape*, 365 U.S. 167 (1961), "facilitated the ability to bring constitutional claims under 42 U.S.C. § 1983").

<sup>11</sup> 197 U.S. 11 (1905).

<sup>12</sup> Wendy E. Parmet et al., *Individual Rights versus the Public's Health—100 Years after Jacobson v. Massachusetts*, 352 NEW ENGL. J. MED. 652, 653 (2005).

<sup>13</sup> *Jacobson*, 197 U.S. at 37-39.

enactment as will protect the public health and the public safety,”<sup>14</sup> Unless a state acted in an “arbitrary, unreasonable manner,” or beyond “what was necessary for the public health or the public safety,” courts would not interfere with public health decisions.<sup>15</sup>

### The era of *Jacobson*

The Supreme Court’s *Jacobson* holding gave lower courts significant discretion in analyzing quarantine law. *Jacobson* allowed lower courts to draw the line between what was “reasonable” versus “arbitrary,” and they often drew the line in a way that favored state intervention. Courts’ decisions seemed to be influenced by three major factors: (1) the background of the plaintiff; (2) proof of exposure or illness; (3) any overtly discriminatory intent. The jurisprudence, however, is hardly uniform, and often conflicting.

*The Background of the Plaintiff.* Throughout the pre-civil rights era, socially undesirable individuals failed in their legal challenges to state-imposed quarantines. Drunks<sup>16</sup>, suspected prostitutes<sup>17</sup>, and immigrants<sup>18</sup> had little recourse in challenging the actions of state and local health officials. A boatload of Italian immigrants, unsuspected of carrying any disease, were successfully prohibited from landing in Louisiana pursuant to a statute providing:

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<sup>14</sup> *Id.* at 25.

<sup>15</sup> *Id.* at 27-28.

<sup>16</sup> *See, e.g.,* Varholly v. Sweat, 153 Fla. 571 (Fl. 1943)(upheld detention and treatment of woman found to have gonorrhea after her original arrest for drunk and disorderly conduct).

<sup>17</sup> *See, e.g.,* Illinois *ex rel.* Baker v. Strautz, 54 N.E. 2d 441, 444 (Ill. 1944)(suspected prostitutes called “natural subjects and carriers of venereal disease” that are “logical[ly] and natural[ly]” subject to “suspicion”). *But cf.* In re Application of Shepard, 195 P. 1077 (Cal. 1921)(holding that woman’s consent to exchange money for sex was insufficient reason to believe she was afflicted with venereal disease and subject to quarantine).

<sup>18</sup> *See, e.g.,* Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380, 385 (1902)(upholding Louisiana’s authority to deny entrance to immigrants who would act as “added fuel” to the flames of a pre-existing contagion in the state).

The state Board of Health may, in its discretion, prohibit the introduction into any infected portion of the state, persons acclimated, unacclimated or said to be immune, when in its judgment the introduction of such persons would add to increase the prevalence of the disease.<sup>19</sup>

The Supreme Court deferred to the Louisiana State Board of Health's judgment, despite that Board's stated intent to declare a quarantine in any part of the state necessary to prevent the immigrants' arrival.<sup>20</sup>

In *Ex parte Company*, the Ohio Supreme Court rejected a suspected prostitute's claims against the constitutionality of the following broad quarantine powers:

Regulation 23 empowers the health commissioner of each city to make examination of persons reasonably suspected of having a venereal disease. All known prostitutes and persons associating with them shall be considered as reasonably suspected of having a venereal disease. Regulation 24 provides that the health commissioner may quarantine any person who has, or is reasonably suspected of having, a venereal disease, whenever in his opinion quarantine is necessary for the protection of the public health.<sup>21</sup>

In contrast, when "a woman of culture and refinement" contracted leprosy during a mission to South America, the Supreme Court of South Carolina would not allow her to be quarantined in:

the city pest house, coarse and comfortless, used only for the purpose of incarcerating negroes having smallpox and other dangerous and infectious diseases . . . adjoin[ing] the city dumping grounds, where the offal of the city is deposited, from which arise foul and unhealthy odors.<sup>22</sup>

*Proof of Exposure or Illness.* After World War I, courts began to increasingly question the proof and legal procedure followed by health officials in imposing

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<sup>19</sup> *Id.* at 385.

<sup>20</sup> *Id.* at 380.

<sup>21</sup> *Ex parte Company*, 139 N.E. 204, 205 (Ohio 1922).

<sup>22</sup> *Kirk v. Bd. of Health*, 65 S.E. 387, 388 (S.C. 1909).

quarantine.<sup>23</sup> This change in judicial attitude was made possible by two major trends. First, communities were beset by fewer acute, short-lived diseases requiring immediate action (e.g., smallpox, plague) and by more chronic, long-term diseases (e.g., venereal disease and tuberculosis).<sup>24</sup> “With both [VD and TB], but particularly with tuberculosis, individuals could be quarantined for long periods of time because neither disease kills quickly.”<sup>25</sup> Second, by mid-century, both VD and TB were generally treatable, and thus did not generate the fears that had precipitated quarantines in earlier years.<sup>26</sup> Both of these trends allowed courts to more closely scrutinize the proof and procedure undertaken by public health officials without significantly increasing risk to the public.

Health officials’ decisions were still treated with relative deference, but many courts began to require those officials to present “sufficient and competent evidence” that the quarantined individual was actually exposed to, or ill from, an infectious disease.<sup>27</sup> The Supreme Court of Iowa ordered a man “suspected” of gonorrhea released after finding quarantine “applicable only ‘when any person shall be sick or infected with any contagious or infectious disease,’” and not when a person was “merely suspected of disease.”<sup>28</sup>

*Overtly Discriminatory Intent.* Some courts were loathe to uphold quarantine actions that seemed motivated by racial animus as opposed to protecting the public

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<sup>23</sup> Parmet, *AIDS and Quarantine*, *supra* note 2, at 68-69.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g.*, State v. Snow 324 S.W.2d 532, 533-34 (Ark. 1959)(commitment to a tuberculosis sanatorium denied where the state failed to introduce any evidence of plaintiff’s TB from x-rays or sputum tests).

<sup>28</sup> Wragg v. Griffin, 170 N.W. 400, 402 (Iowa 1919). *But cf.* Reynolds v. McNichols, 488 F.2d 1378, 1382 (10th Cir. 1973)(“It is not illogical or unreasonable, and on the contrary it is reasonable, to suspect that known prostitutes are a prime source of infectious venereal disease. Prostitution and venereal disease are no strangers.”).



health. During a plague scare<sup>29</sup> in the spring of 1900, the city of San Francisco refused to let Chinese residents leave the city limits unless they agreed to inoculation with Haffkine Prophylactic.<sup>30</sup> Roughly fifteen thousand Chinese residents were subject to this restraint, even though white residents in their same neighborhoods were not, belying the notion that officials were trying to contain the spread of an epidemic.<sup>31</sup> In *Wong Wai v. Williamson*, the plaintiff launched a successful equal protection challenge to this inoculation requirement.<sup>32</sup> Moreover, the court demonstrated that the inoculation requirement was wholly inappropriate to the Board of Health's stated goal of protecting those exposed to plague:

The Haffkine material should not be used if the person has been definitely exposed to the plague, or is thought to be in the incubative period; for, if by chance he is already infected, the Haffkine injection may produce fatal results. Therefore the Haffkine material should be used as a preventive on persons before their exposure, while the Yersin treatment may be used either before or after exposure, or while a person is suffering with the disease. The Haffkine material should not be used on suspects held in quarantine, or on persons who have been definitely exposed to the plague, but is applicable to persons who are liable to be brought into contact with plague, and before such possible contact, as quarantine officers and attendants, health officers and employes[sic], and persons in a community where there is danger of the introduction and spread of the disease.<sup>33</sup>

Thus, the court found that “the administration of Haffkine Prophylactic to Chinese persons departing from San Francisco has no relation to the public health of the

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<sup>29</sup> In spite of the pronouncements of public officials, one expert stated “there has not been found a single living case of said disease.” *Jew Ho v. Williamson*, 103 F. 10, 21 (C.C.N.D. Cal 1900)(quoting the affidavit of Dr. J. I. Stephen).

<sup>30</sup> *Wong Wai v. Williamson*, 103 F. 1, 5 (C.C.N.D. Cal. 1900).

<sup>31</sup> The city justified its ordinance by claiming the “Asiatic race” was “more liable to the plague than any other” race, but offered no evidence or proof of its claim. *Id.* at 7. Moreover, the city had “no pretense that previous residence, habits, exposure to disease, method of living, or physical condition has anything to do with their classification as subject to the regulations.” *Id.* at 9.

<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Id.* at 7-8 (quoting the instructions of the supervising surgeon general of the marine hospital service on selecting a proper plague inoculant).

inhabitants of this city, and cannot be sustained by any such claim on the part of its board of health”<sup>34</sup>

The city of San Francisco’s actions were subject to further judicial condemnation in *Jew Ho v. Williamson*,<sup>35</sup> which struck down physical restrictions on Chinese within the quarantine zone. Without attempting to isolate the houses of the alleged plague victims, the city had restricted Chinese movement in twelve city blocks, thereby increasing the danger that the disease would spread further within this wide area.<sup>36</sup> The court rejected this exercise of the police power as ineffective for its purpose (i.e. “preventing the spread of such diseases among the inhabitants of such localities”), and held that the quarantine “was not a reasonable regulation to accomplish the purposes sought.”<sup>37</sup> The court further criticized the quarantine as being applied “with an evil eye and an unequal hand” to Chinese only, and therefore held the ordinance invalid as “contrary to the provisions of the fourteenth amendment.”<sup>38</sup>

*Summary.* By the time the Warren court began to revolutionize constitutional and civil rights jurisprudence, lower courts had become gradually less deferential to public health officials in response to changing public attitudes and transformed epidemiology. Advances in medicine brought an effective halt to most of the lethal epidemics of earlier times, and the status of quarantine law remained, for the most part, static for several decades to come.

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<sup>34</sup> *Id.* at 9.

<sup>35</sup> 103 F. 10 (C.C.N.D. Cal. 1900).

<sup>36</sup> “If we are to suppose that this bubonic plague has existed in San Francisco since the 6th day of March, and that there has been danger of its spreading over the city, the most dangerous thing that could have been done was to quarantine the whole city, as to the Chinese, as was substantially done in the first instance.” *Id.* at 22.

<sup>37</sup> *Id.* at 21-23.

<sup>38</sup> *Id.* at 24 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)).

## The Civil Rights Era: Indirect Effects on Quarantine Law

Courts in the latter half of the twentieth century increasingly demanded procedural due process protections for those deprived of liberty or property.<sup>39</sup> The focus on procedure was a dramatic change from a hundred years earlier, when one court declared that a warrant “could be of no importance to a sick man,” and held constitutional a quarantine statute containing “no provision for any examination by the justices, nor for notice to any parties to be heard, nor could any appeal be had.”<sup>40</sup> The post-deprivation remedies of habeas corpus and suits for damages<sup>41</sup> that were generally a plaintiff’s only recourse were no longer seen as constitutionally sufficient.<sup>42</sup>

Despite a few notable exceptions,<sup>43</sup> there have been few cases examining state quarantine actions since the landmark 1970’s decisions on procedural due process. There have been a number of cases, however, concerning the analogous situation of civil commitment proceedings for the mentally ill and mentally retarded.<sup>44</sup> “Although civil commitment cases often concern the mentally ill, the principles these cases enunciate also

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<sup>39</sup> See *Parmet, AIDS and Quarantine*, *supra* note 2, at 78; *Mathews v. Eldridge*, 424 U.S. 319 (1976)(procedural due process in fifth amendment context); *Board of Regents v. Roth*, 408 U.S. 564 (1972)(fourteenth amendment context).

<sup>40</sup> *Haverty v. Bass*, 66 Me. 71, 73 (Me. 1876). But see *Kirk v. Wyman*, *supra* note 7, at 379 (requiring notice and hearing before quarantine imposed, except in emergency circumstances).

<sup>41</sup> *Id.* at 74 (“If an injury is inflicted upon a person by the malice of the public servants, he has a remedy for it. And the petition for habeas corpus is always open to him.”); *People ex rel. Barmore v. Robertson* 134 N.E. 815, 819 (Ill. 1922)(“Where one has been arrested and placed under quarantine on the ground that he is afflicted with a contagious disease he has the right to have the legality of his detention inquired into by habeas corpus.”)(citing *ex parte Hartcastle*, 208 S.W. 531 (Ct. Crim. App. Tex. 1919)).

<sup>42</sup> See, e.g., *Greene v. Edwards*, 263 S.E.2d 661, 662 (W. Va. 1980)(tuberculosis control act unconstitutional for lack of procedural due process).

<sup>43</sup> *Id.*; *Souvannarath v. Hadden*, 116 Cal. Rptr. 2d 7 (Cal. Ct. App. 2002) (public health authorities violated quarantine statute by detaining noncompliant multi-drug resistant tuberculosis patient in a county jail); *City of New York v. Doe*, 614 N.Y.S.2d 8, 9 (N.Y. App. Div. 1994)(detention order upheld after clear and convincing evidence that less restrictive alternatives would be ineffective in treating respondent’s multi-drug resistant TB); *City of New York v. Antoinette R.*, 630 N.Y.S.2d 1008 (detention order upheld after clear and convincing evidence that less restrictive alternatives would be ineffective in treating historically noncompliant respondent’s TB).

<sup>44</sup> See, e.g., *O’Connor v. Donaldson*, 422 U.S. 563 (1975); *Vitek v. Jones*, 445 U.S. 480 (1980); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Washington v. Harper*, 494 U.S. 210 (1990).

apply to isolation and quarantine measures.”<sup>45</sup> Cases concerning civil commitment of the mentally ill apply to isolation and quarantine because “involuntary commitment for having communicable [diseases] impinges on the right to liberty . . . no less than involuntary commitment for being mentally ill.”<sup>46</sup> Thus, to understand how courts might handle future legal challenges to quarantine, mental health civil commitment cases are considered the best guidance.

### Civil Commitment of the Mentally Ill and Mentally Retarded

In *O’Connor v. Donaldson*, the Supreme Court held that even if a mental patient’s “original confinement was founded upon a constitutionally adequate basis” of potential harm to himself and others, that confinement could not constitutionally continue simply based on mental illness if he was no longer dangerous.<sup>47</sup> In a concurring opinion, Chief Justice Burger set out three constitutional requirements for civil commitment of an individual, namely that (1) such commitment “must be justified on the basis of a legitimate state interest,” (2) that the reasons for commitment “must be established in an appropriate proceeding,” and (3) that “confinement must cease when those reasons no longer exist.”<sup>48</sup>

In *Addington v. Texas*, the Supreme Court held that the state must justify civil commitment for mental illness “by proof more substantial than a mere preponderance of

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<sup>45</sup> Fidler et al., *Through the Quarantine Looking Glass*, *supra* note 7, at 621.

<sup>46</sup> *Greene v. Edwards*, 263 S.E.2d 661, 663 (W. Va. 1980). *See also* *O’Connor v. Donaldson*, 422 U.S. 563, 580 (“There can be no doubt that involuntary commitment to a mental hospital, like involuntary commitment of an individual for any reason [e.g., quarantine], is a deprivation of liberty which the state cannot accomplish with due process of law.”)(Burger, C.J., concurring)(citing *Specht v. Patterson*, 386 U.S. 605, 608 (1967)).

<sup>47</sup> 422 U.S. 563, 574-76 (1975)(“[T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.”).

<sup>48</sup> *Id.* at 580 (Burger, C.J., concurring)(citing *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249-50 (1972); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

the evidence” in order to satisfy due process.<sup>49</sup> Rejecting the plaintiff’s argument that proof “beyond a reasonable doubt” was necessary, the Court stated that “[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.”<sup>50</sup> The Court remanded to the Texas Supreme Court for “determination of the precise burden equal to or greater than the ‘clear and convincing’ standard which we hold is required to meet due process guarantees.”<sup>51</sup> Showcasing the more modern approach to due process rights, the Court reached this holding by balancing “the individual’s interest in not being involuntarily confined indefinitely and the state’s interest in committing the emotionally disturbed under a particular standard of proof,” while also endeavoring “to minimize the risk of erroneous decisions.”<sup>52</sup>

One year later in *Vitek v. Jones*, the Court held that a prisoner transferred to a mental hospital required greater procedural protections than a single opinion from a psychiatrist that the transfer was necessary.<sup>53</sup> The Court noted that involuntary commitment results in a loss of liberty as a result of both the confinement itself and the social stigma attached to mental health commitment,<sup>54</sup> and that these were “the kind of

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<sup>49</sup> 441 U.S. 418, 427 (1979).

<sup>50</sup> *Id.* at 429-30 (citing *O'Connor v. Donaldson*, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring); *Blocker v. United States*, 288 F.2d 853, 860-61 (D.C. Cir. 1961) (opinion concurring in result)).

<sup>51</sup> *Id.* at 433.

<sup>52</sup> *Id.* at 425 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

<sup>53</sup> 445 U.S. 480, 491 (1980) (“Nebraska’s reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting a transfer exist neither removes the prisoner’s interest from due process protection nor answers the question of what process is due under the Constitution.”).

<sup>54</sup> *Id.* at 492 (“The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital ‘can engender adverse social consequences to the individual’ and that ‘[whether] we label this phenomena “stigma” or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.’”)(quoting *Addington v. Texas*, 441 U.S. 418, 425-26 (1979)).

deprivations of liberty that require[] procedural protections.”<sup>55</sup> Conceding that “the interest of the State in segregating and treating mentally ill patients is strong,” the Court found that the prisoner’s interest, coupled with the risk of error in mental health determinations, still warranted procedural safeguards including notice, counsel, and an adversarial hearing before an independent decisionmaker.<sup>56</sup> Importantly, “[t]he medical nature of the inquiry” did “not justify dispensing with due process requirements.”<sup>57</sup>

*Youngberg v. Romeo* presented the question whether an involuntarily committed mentally retarded man had substantive due process rights to “(i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or ‘habilitation.’”<sup>58</sup> Disposing of part (i), the Court stated “the right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause,” and that such right is not extinguished by confinement.<sup>59</sup> Similarly, (ii) freedom from bodily restraint “always has been recognized as the core of the liberty protected by the Due Process clause from arbitrary governmental action,” and could not be extinguished by either incarceration or involuntary commitment.<sup>60</sup>

Romeo’s profound mental retardation led to bouts of violent and self-destructive behavior, and therefore the Court held that he had a constitutional right to (iii) training “as an appropriate professional would consider reasonable to ensure his [(i)] safety and to facilitate his ability to function [(ii)] free from bodily restraints.”<sup>61</sup> By defining a constitutional right in terms of a medical professional’s judgment, the Court sought to

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<sup>55</sup> *Id.* at 494.

<sup>56</sup> *Id.* at 496.

<sup>57</sup> *Id.* at 495.

<sup>58</sup> 457 U.S. 307, 309 (1982).

<sup>59</sup> *Id.* at 315 (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

<sup>60</sup> *Id.* at 316 (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979)(Powell, J., concurring in part and dissenting in part)).

<sup>61</sup> *Id.* at 324.

“protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with difficult social problems.”<sup>62</sup>

In *Washington v. Harper*, the Court held that a violent, mentally-ill prisoner’s liberty interest in avoiding administration of antipsychotic drugs was sufficiently addressed in a non-judicial hearing of medical professionals<sup>63</sup>. The prisoner’s constitutional right to be free of medication had to be balanced against the state’s duty to treat mentally ill inmates and run a safe prison, and the State’s procedures did not deprive inmates of their rights without sufficient due process.<sup>64</sup> “The primary point of disagreement between the parties [was] whether due process requires a judicial decisionmaker”<sup>65</sup> as opposed to a medical decisionmaker, and the Court held that “an inmate’s interests are adequately protected, and perhaps better served by,” a medically trained, non-judicial decisionmaker.<sup>66</sup>

Furthermore, the opinion rejected the prisoner’s argument that his hearing was inadequate because he was not afforded counsel. “It is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment.”<sup>67</sup> Contrary to the holding in *Addington v. Texas*,<sup>68</sup> the Court held that a “clear, cogent, and convincing” standard of proof was “neither required nor helpful” in determining whether

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<sup>62</sup> *Id.* at 323, n. 29 (quoting *Parham v. J.R.*, 442 U.S. 584, 608, n. 16 (1979)).

<sup>63</sup> 494 U.S. 210, 222-23 (1990).

<sup>64</sup> *Id.* at 229 (“Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), we consider the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the Fourteenth Amendment.”)(quoting *Hewitt v. Helms*, 459 U.S. 460, 473 (1983)).

<sup>65</sup> *Id.* at 228.

<sup>66</sup> *Id.* at 231.

<sup>67</sup> *Id.* at 236 (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 (1985)(emphasis in original)).

<sup>68</sup> 441 U.S. 418 (1979).

to medicate the prisoner.<sup>69</sup> In his dissent, Justice Stevens objected that “[t]he purpose of this standard of proof, to reduce the chances of inappropriate decisions, is no less meaningful when the factfinders are professionals as when they are judges or jurors.”<sup>70</sup>

### The 21<sup>st</sup> Century: Current Events Drive Reform Proposals

“No large-scale human quarantine has been implemented within the United States since the 1918 influenza pandemic.”<sup>71</sup> A cascade of events has driven interest in updating the nation’s antiquated quarantine laws: the September 11, 2001 terrorist attacks<sup>72</sup>, the anthrax murders of 2001<sup>73</sup>, fears of larger scale bioterrorist attacks<sup>74</sup>, SARS outbreaks<sup>75</sup>, Avian flu<sup>76</sup>, and extremely drug resistant (“XDR”) tuberculosis as exemplified by the Andrew Speaker case.<sup>77</sup> The early years of the AIDS virus prompted

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<sup>69</sup> Washington, 494 U.S. at 235.

<sup>70</sup> *Id.* at 255, n. 28 (Stevens, J., dissenting)(internal citations omitted).

<sup>71</sup> Swendiman & Elsea, *Federal and State Quarantine and Isolation Authority*, *supra* note 3, at 9 n. 54.

<sup>72</sup> See generally White House, Office of Homeland Security, *National Strategy for Homeland Security*, July 2002, available at [http://www.whitehouse.gov/homeland/book/nat\\_strat\\_hls.pdf](http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf) (last visited April 26, 2008).

<sup>73</sup> Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Responding to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622, 622 (2002)(“The intentional dispersal of anthrax through the US postal system in New York, Washington, and other locations resulted in 5 confirmed deaths, hundreds of persons treated, and thousands tested.”); *Id.* at 623 (“In 1991, the US Congressional Office of Technology Assessment estimated that the aerosolized release of 100 kg of anthrax spores upwind of Washington, DC, could result in approximately 130 000 to 3 million deaths, a weapon as deadly as a hydrogen bomb.”).

<sup>74</sup> See Joseph Barbera et al., *Large-Scale Quarantine Following Biological Terrorism in the United States: Scientific Examination, Logistic and Legal Limits, and Possible Consequences*, 286 JAMA 2711, 2711 (2001)(“It is now generally acknowledged that a large-scale bioterrorist attack is plausible and could conceivably generate large numbers of seriously ill exposed individuals, potentially overwhelming local or regional health care systems.”).

<sup>75</sup> See generally Lawrence O. Gostin et al., *Ethical and Legal Challenges Posed by Severe Acute Respiratory Syndrome: Implications for the Control of Severe Infectious Disease Threats*, 290 JAMA 3229 (2003).

<sup>76</sup> See generally Lawrence O. Gostin, *Medical Countermeasures for Pandemic Influenza: Ethics and the Law*, 295 JAMA 554 (2006); Lawrence O. Gostin, *Public Health Strategies for Pandemic Influenza: Ethics and the Law*, 295 JAMA 1700 (2006); Lawrence O. Gostin & Benjamin E. Berkman, *Pandemic Influenza: Ethics, Law, and the Public’s Health*, 59 ADMIN. L. REV. 121 (2007).

<sup>77</sup> See generally Dr. Howard Markel et al., *Extensively Drug-Resistant Tuberculosis: An Isolation Order, Public Health Powers, and a Global Crisis*, 298 JAMA 83, 83 (2007); Rose M. Gasner et al., *The Use of Legal Action in New York City to Ensure Treatment of Tuberculosis*, 340 N. ENGL. J. MED. 359 (1999).



similar, but short-lived, calls for revival of quarantine law<sup>78</sup> based on shoddy understandings of its epidemiology. Unlike the emergence of the AIDS virus, the twin pressures of the war on terrorism and potential pandemics have catalyzed lasting interest in quarantine over the past seven years.

The drive to reform quarantine law has proceeded somewhat haltingly on both the state and federal level. At the state level, debate has centered on the Model State Emergency Health Powers Act (the “MSEHPA”, or “Model Act”) drafted shortly after 9/11.<sup>79</sup> At the federal level, proposed revisions to Centers for Disease Control (the “CDC”) quarantine regulations have been the focus of debate.<sup>80</sup> Select portions of the MSEHPA have achieved widespread adoption<sup>81</sup>, while the attempted federal reforms have stalled.<sup>82</sup>

#### The MSEHPA and its Critics: Balancing Safety Against Liberty

In the aftermath of the 9/11 attacks, public health academics had the momentum for an undertaking they had long advocated: reform of American quarantine law.<sup>83</sup> The MSEHPA was the opening statement in a debate over how the U.S. should respond to the threat of bioterrorism and pandemic disease. To its critics, the MSEHPA was a hastily drafted proposal that did not afford sufficient constitutional guarantees to the general

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<sup>78</sup> Tamar Lewin, *Rights of Citizens and Society Raise Legal Muddle on AIDS*, N.Y. TIMES, Oct. 14, 1987 (reporting that conservative icons Jesse Helms and Pat Robertson felt “quarantine may be necessary.”).

<sup>79</sup> The Center for Law and the Public’s Health at Georgetown and Johns Hopkins Universities, *The Model State Emergency Health Powers Act*, (Dec. 21, 2001) [hereinafter *The Model State Emergency Health Powers Act*], available at <http://www.publichealthlaw.net/Resources/Modellaws.htm> (last visited Apr. 26, 2008).

<sup>80</sup> Department of Health and Human Services, Control of Communicable Diseases (Proposed Rule), 42 CFR Parts 70 and 71 (Nov. 30, 2005).

<sup>81</sup> Fidler et al., *Through the Quarantine Looking Glass*, *supra* note 7, at 621 (“The review process has included nearly 40 states adopting, in whole or in part, the Model State Emergency Health Powers Act.”).

<sup>82</sup> *Id.* at 624.

<sup>83</sup> White House, Office of Homeland Security, *National Strategy for Homeland Security*, *supra* note 72, at xi (identifying a review of state quarantine authorities as one of twelve major initiatives to “help enable our country to fight the war on terrorism more effectively.”).

public.<sup>84</sup> To its authors, the MSEHPA was a desperately needed framework for preparing state government to deal with crises in a constitutionally appropriate manner.<sup>85</sup>

### Modern Definitions of Isolation and Quarantine

Before discussing the MSEHPA, it is valuable to note the modern definitions of “quarantine” and “isolation” used in the MSEHPA and other literature on public health. Isolation is the physical separation and confinement of individuals who *are infected or thought to be infected* to limit the spread of disease. Quarantine is the physical separation and confinement of individuals who *may have been exposed* to a contagious disease, but do not show signs or symptoms of disease, to limit the spread of disease.<sup>86</sup>

### Purposes of the MSEHPA

The MSEHPA was drafted in light of two basic goals: (1) eliminating problems of “obsolescence, inconsistency, and inadequacy” in state laws written long before modern understandings of epidemiology; and (2) updating the laws to reflect changes in constitutional law.<sup>87</sup>

The Model Act is structured to reflect 5 basic public health functions to be facilitated by law: (1) *preparedness*, comprehensive planning for a public health emergency; (2) *surveillance*, measures to detect and track public health emergencies; (3) *management of property*, ensuring adequate availability of vaccines, pharmaceuticals, and hospitals, as well as providing power to abate hazards to the public’s health; (4) *protection of*

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<sup>84</sup> See George J. Annas, *Blinded by Bioterrorism: Public Health and Liberty in the 21st Century*, 13 Health Matrix 33, 55 (Winter 2003) (“Today, all adults have the constitutional right to refuse examination and treatment, and such a refusal should not result in involuntary confinement simply on the say so of a public health official.”).

<sup>85</sup> See Lawrence O. Gostin, *Public Health Law in an Age of Terrorism: Rethinking Individual Rights and Common Goods*, 21 HEALTH AFFAIRS 79, 91 (Nov./Dec. 2002) (“In summary, MSEHPA provides a modern framework for effective identification of and response to emerging health threats, while demonstrating respect for individuals and tolerance of groups. Indeed, the [Center for Law and the Public’s Health] agreed to draft the law only because a much more draconian approach might have been taken by the federal government and the states acting on their own and responding to public fears and misapprehensions.”).

<sup>86</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 10-11.

<sup>87</sup> See Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622 (2002)[hereinafter *Planning for and Response to Bioterrorism*].

*persons*, powers to compel vaccination, testing, isolation, and quarantine when clearly necessary; and (5) *communication*, providing clear and authoritative information to the public. The Model Act also contains a modernized, extensive set of principles and requirements to safeguard personal rights.<sup>88</sup>

### Provisions of the MSEHPA

“The [MSEHPA] gives rise to 2 kinds of public health powers and duties: those that exist in the preemergency environment . . . and a separate group of powers and duties that come into effect only after a state’s governor declares a public health emergency . . . . Postdeclaration powers deliberately are broader and more robust.”<sup>89</sup> The pre-declaration provisions primarily address pre-emergency planning<sup>90</sup> and reporting requirements for physicians and hospitals to notify public health authorities of developing trends of infection.<sup>91</sup> The governor may enable stronger public health powers, with or without consultation with health authorities, in the event of a “public health emergency,” which is defined as:

- [A]n occurrence or imminent threat of an illness or health condition that:
- (1) is believed to be caused by any of the following:
    - (i) bioterrorism;
    - (ii) the appearance of a novel or previously controlled or eradicated infectious biological agent or biological toxin;
    - (iii) [*a natural disaster*];
    - (iv) [*a chemical attack or accidental release*; or]
    - (v) [*a nuclear attack or accident*]; and
  - (2) poses a high probability of any of the following harms:
    - (i) a large number of deaths in the affected population;
    - (ii) a large number of serious or long-term disabilities in the affected population; or

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<sup>88</sup> *Id.* at 622.

<sup>89</sup> *Id.* at 625.

<sup>90</sup> *Id.* at 625-26 (“Under Article II (Planning for a Public Health Emergency), the Public Health Emergency Planning Commission (appointed by the governor) must prepare a plan which includes coordination of services; procurement of necessary materials and supplies; housing, feeding, and caring for affected populations (with appropriate regard for their physical and cultural/social needs); and the proper vaccination and treatment of individuals in the event of a public health emergency.”).

<sup>91</sup> *Id.* at 626 (“[P]ublic health, emergency management, and public safety authorities are required to share information necessary to prevent, treat, control, or investigate a public health emergency.”).

(iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.<sup>92</sup>

The state of emergency may be terminated by (1) executive order of the governor, (2) automatic termination in 30 days if the governor does not renew the declaration, or (3) majority vote of the state legislature.<sup>93</sup>

*Takings and Destruction of Property.* Article V of The MSEHPA provides for Management of Property during a public health emergency. Public health authorities have permission to “close, decontaminate, or procure facilities and materials to respond to a public health emergency, safely dispose of infectious waste, and obtain and deploy health care supplies.”<sup>94</sup> The MSEHPA provides for “just compensation to the owner of any facilities or materials that are lawfully taken or appropriated by a public health authority for its temporary or permanent use.”<sup>95</sup>

The Model Act provides no compensation, however, for “facilities and materials that are closed, evacuated, decontaminated, or destroyed when there is reasonable cause to believe that they may endanger the public health,”<sup>96</sup> which comports with Supreme Court jurisprudence on nuisance abatement.<sup>97</sup> The Model Act does provide that any destruction of property be preceded by civil proceedings to “[t]he extent practicable with the protection of public health.”<sup>98</sup> In the words of Professor Lawrence Gostin, one of the

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<sup>92</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 11 (brackets and emphasis in original).

<sup>93</sup> *Id.* at 20.

<sup>94</sup> *Planning for and Response to Bioterrorism*, *supra* note 87, at 626.

<sup>95</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 25.

<sup>96</sup> *Id.*

<sup>97</sup> *Planning for and Response to Bioterrorism*, *supra* note 87, at 626.

<sup>98</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 25.

primary authors of the Model Act, “[i]f the government were forced to compensate for all nuisance abatements, it would significantly chill public health regulation.”<sup>99</sup>

*Conditions and Principles of Isolation and Quarantine.* “The Model Act permits public health authorities to physically examine or test individuals as necessary to diagnose or to treat illness, vaccinate or treat individuals to prevent or ameliorate an infectious disease, and isolate or quarantine individuals to prevent or limit the transmission of a contagious disease.”<sup>100</sup> The “conditions and principles” limiting the use of isolation and quarantine are reflective of a significantly more modern approach to public health than pre-existing state law:

- (1) Isolation and quarantine must be by the least restrictive means necessary to prevent the spread of a contagious or possibly contagious disease to others and may include, but are not limited to, confinement to private homes or other private and public premises.
- (2) Isolated individuals must be confined separately from quarantined individuals.
- (3) The health status of isolated and quarantined individuals must be monitored regularly to determine if they require isolation or quarantine.
- (4) If a quarantined individual subsequently becomes infected or is reasonably believed to have become infected with a contagious or possibly contagious disease he or she must promptly be removed to isolation.
- (5) Isolated and quarantined individuals must be immediately released when they pose no substantial risk of transmitting a contagious or possibly contagious disease to others.
- (6) The needs of persons isolated and quarantined shall be addressed in a systematic and competent fashion, including, but not limited to, providing adequate food, clothing, shelter, means of communication with those in isolation and quarantine and outside these settings, medication, and competent medical care.
- (7) Premises used for isolation and quarantine shall be maintained in a safe and hygienic manner and be designed to minimize the likelihood of further transmission of infection or other harms to persons isolated and quarantined.

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<sup>99</sup> *Planning for and Response to Bioterrorism*, *supra* note 87, at 626.

<sup>100</sup> *Id.*

- (8) To the extent possible, cultural and religious beliefs should be considered in addressing the needs of individuals, and establishing and maintaining isolation and quarantine premises.<sup>101</sup>

*Temporary and Longer-Lasting Isolation and Quarantine.* The Model Act provides for either temporary isolation/quarantine without notice or a more lasting isolation/quarantine with notice.<sup>102</sup> The public health authority is authorized to execute temporary isolation/quarantine without petitioning a court if “delay in imposing the isolation or quarantine would significantly jeopardize the public health authority’s ability to prevent or limit the transmission of a contagious or possibly contagious disease to others.”<sup>103</sup> This temporary quarantine may last for up to ten days.<sup>104</sup> Within this ten day period, the public health authority must file a petition “for a court order authorizing the continued isolation or quarantine of the isolated or quarantined individuals or groups of individuals.”<sup>105</sup>

Within twenty-four hours of the petition’s filing, individuals or groups identified in the petition must be given notice “in accordance with the rules of civil procedure.”<sup>106</sup> A hearing must be held within five days of the petition, unless the public health authority shows good cause for a continuance of up to ten days in extraordinary circumstances.<sup>107</sup> “[T]he court may grant [the continuance] in its discretion giving due regard to rights of the affected individuals, the protection of the public’s health, the severity of the emergency and the availability of necessary witnesses and evidence.”<sup>108</sup>

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<sup>101</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 27-28.

<sup>102</sup> *Id.* at 28-30.

<sup>103</sup> *Id.* at 28-29.

<sup>104</sup> *Id.* at 29.

<sup>105</sup> *Id.* This petition must show, among other things, a statement of compliance with the eight conditions and principles for isolation and quarantine listed on the previous page of this paper. *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 29.

<sup>108</sup> *Id.*

*The Legal Standard for Isolation or Quarantine.* The court must “grant the petition [for isolation/quarantine] if, by a preponderance of the evidence, isolation or quarantine is shown to be reasonably necessary to prevent or limit the transmission of a contagious or possibly contagious disease to others.”<sup>109</sup> The order authorizing isolation or quarantine can last no longer than thirty days, and the public health authority may petition for continuances, under the same standards of the original order, of no more than thirty additional days.<sup>110</sup>

*Rights of Those Isolated or Quarantined.* The isolated/quarantined individuals “may apply to the trial court for an order to show cause why [they] should not be released,” and the trial court must rule on the application to show cause within forty-eight hours.<sup>111</sup> If the application is granted, the court must schedule a hearing within twenty-four hours.<sup>112</sup>

The individuals who are isolated/quarantined (or about to be isolated/quarantined) must be provided with counsel at the state’s expense if they do not have their own.<sup>113</sup> “To promote the fair and efficient operation of justice,” the court is permitted to consolidate individual claims into groups where:

- (i) the number of individuals involved or to be affected is so large as to render individual participation impractical;

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<sup>109</sup> *Id.* at 30.

<sup>110</sup> *Id.* (“The order shall (a) identify the isolated or quarantined individuals or groups of individuals by name or shared or similar characteristics or circumstances; (b) specify factual findings warranting isolation or quarantine pursuant to this Act; (c) include any conditions necessary to ensure that isolation or quarantine is carried out within the stated purposes and restrictions of this Act; and (d) [be] served on affected individuals or groups of individuals in accordance with the rules of civil procedure.”).

<sup>111</sup> *Id.*

<sup>112</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 30. Despite this provision, “in extraordinary circumstances and for good cause shown the public health authority may move the court to extend the time for a hearing, which extension the court in its discretion may grant giving due regard to the rights of the affected individuals, the protection of the public’s health, the severity of the emergency and the availability of necessary witnesses and evidence.” *Id.* at 30-31.

<sup>113</sup> *Id.* at 31.

- (ii) there are questions of law or fact common to the individual claims or rights to be determined;
- (iii) the group claims or rights to be determined are typical of the affected individuals' claims or rights; and
- (iv) the entire group will be adequately represented in the consolidation.<sup>114</sup>

*Compulsory Medical Examinations, Vaccinations, and Treatments.* The MSEHPA provides for compulsory medical examinations, vaccinations, and treatment of infectious diseases during a public health emergency.<sup>115</sup> Those who are unwilling to submit to examination, vaccination, or treatment are subject to isolation or quarantine, even if their reluctance is due to “reasons of health, religion, or conscience.”<sup>116</sup> Those who disobey quarantine or isolation orders are guilty of a misdemeanor.<sup>117</sup>

*Limited Liability.* State and private actors cooperating in the event of a public health emergency are immune from civil liability except in cases of gross negligence or willful misconduct.<sup>118</sup>

### Criticism of the MSEHPA

“The act seems to have been drafted for a different age, and would be more at home in the U.S. of the 19th century rather than the 21st.”<sup>119</sup> This quote from Professor George Annas is representative of much criticism of the MSEHPA. Professor Annas raises several concerns with the Model Act: (1) mass quarantines and compulsory vaccinations will do more harm than good by creating public panic<sup>120</sup>, and that a tradeoff

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<sup>114</sup> *Id.* The court is required to give “due regard to the rights of the affected individuals, the protection of the public’s health, the severity of the emergency and the availability of necessary witnesses and evidence.” *Id.*

<sup>115</sup> *Id.* at 26-27.

<sup>116</sup> *Id.*

<sup>117</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 28.

<sup>118</sup> *Id.* at 37.

<sup>119</sup> Annas, *Blinded by Bioterrorism*, *supra* note 84, at 55.

<sup>120</sup> *Id.* at 56 (“[D]raconian quarantine measures seem most likely to create public panic that will encourage people to avoid public health officials and physicians rather than seek them out.”); *Id.* at 46 (“[P]lanning for



between civil rights and public health is unnecessary in an informed modern society<sup>121</sup>; (2) the MSEHPA's focus on reforming state law, rather than federal law, is misguided<sup>122</sup>; (3) the immunity provisions are unfair and unnecessary<sup>123</sup>; and (4) the provisions of the MSEHPA are somewhat questionable under modern constitutional law.<sup>124</sup>

Professor Lawrence Gostin, one of the primary authors of the act, has published several articles defending the MSEHPA, and makes the arguments that follow. First, not everyone can be expected to comply with public health measures.<sup>125</sup> This point may be best exemplified by the case of Andrew Speaker, who disregarded public health orders to remain in Atlanta for treatment of XDR-TB, and instead undertook international travel to at least four foreign countries before turning himself in to the CDC.<sup>126</sup> So long as

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mass quarantine and forced vaccination – likely with investigational vaccines – are unreasonable steps that are more likely to foster public panic and distrust than to be effective in a real emergency.”); *Id.* at 65 (“In one three day period [during the SARS outbreak], for example, after a rumor that Beijing itself might be quarantined or put under martial law, almost a quarter of a million migrant workers fled to rural Henan province; and in a small rural town, Chagugang, thousands rioted and destroyed a building that was being finished to quarantine SARS patients.”).

<sup>121</sup> *Id.* at 54-55 (contrasting the necessary use of quarantine in the 19th century, when “vaccination itself remained controversial, there were no antibiotics, physicians were not universally trusted, science and medicine was in its infancy, and hospitals were seen primarily as ‘pest houses’” with the modern age, where “it seems reasonable to think that we can predictably rely on well-informed Americans – who are not the enemy in a bioterrorist attack – to follow the reasonable instructions of government officials they trust for their own protection.”)(citing CHARLES ROSENBERG, *THE CARE OF STRANGERS: THE RISE OF AMERICA'S HOSPITAL SYSTEM*, 15-32, 209-11 (1987)); Jonathan Bor, *Americans are Taking Antibiotics into Own Hands, in Case of Anthrax: Officials Vainly Caution Against Stockpiling, Random Self-medication*, BALT. SUN, Oct. 13, 2001, at 5A (describing the public's overly enthusiastic desire to treat themselves for possible anthrax exposure).

<sup>122</sup> *Id.* at 53-54 (“[B]ioterrorism is a matter of national security, not just state police powers. . . . The Governors of the states involved in actual anthrax attacks all realized that bioterrorism is fundamentally a federal issue, and quickly called for action by both the FBI and the CDC to deal with the attacks.”).

<sup>123</sup> *Id.* at 60 (“[S]uch immunity is something public health authorities should not want (even though it may have superficial appeal), because it means that they are not accountable for their actions, no matter how arbitrary. The immunity provision thus serves only to undermine the public's trust in public health emergencies.”).

<sup>124</sup> Annas, *Blinded by Bioterrorism*, *supra* note 84, at 55.

<sup>125</sup> Gostin, *Public Health Law in an Age of Terrorism*, *supra* note 85, at 88.

<sup>126</sup> See Markel et al., *Extensively Drug-Resistant Tuberculosis*, *supra* note 77, at 83 (noting that Speaker actually *accelerated* his travel plans after being notified of his condition, despite being warned of the risks to himself and others).

individuals like Speaker behave irresponsibly, compulsory powers must exist to protect the public, and this necessity requires a trade-off between civil liberties and public safety.

Second, while national security is a federal obligation, “most public health activities take place at the state and local level,” and states “must have effective, modern statutory powers” if they are to coordinate effectively with federal agencies during a bioterrorist emergency.<sup>127</sup> Without effective assistance from the states, the federal government cannot respond effectively to a public health crisis.

Third, the immunity provisions of the Model Act were drafted in recognition “that if government officials, health professionals, and others are to fulfill their responsibilities for preventing and responding to a serious health threat, they should not fear unwarranted liability.”<sup>128</sup> The MSEHPA still provides for liability in cases of gross negligence or willful misconduct, but allows emergency workers the latitude they need for effective decision-making.

### Is The MSEHPA Constitutional?

The MSEHPA provides procedural due process protections that are adequate under the Supreme Court’s civil commitment jurisprudence. The following paragraphs apply the holdings of the five cases discussed earlier in this paper (*O’Connor*, *Addington*, *Vitek*, *Youngberg*, and *Washington*) to the provisions of the MSEHPA.

*O’Connor v. Donaldson*.<sup>129</sup> The provisions of the MSEHPA fit well with the holding of *O’Connor*, as well as Chief Justice Burger’s concurrence:

<b><i>O’Connor</i> Holding / Burger Concurrence</b>	<b>MSEHPA</b>
Confinement based on mental	Isolated and quarantined

<sup>127</sup> Gostin, *Public Health Law in an Age of Terrorism*, *supra* note 85, at 87.

<sup>128</sup> *Planning for and Response to Bioterrorism*, *supra* note 87, at 626.

<sup>129</sup> 422 U.S. 563 (1975).

illness could not continue if the patient was no longer dangerous <sup>130</sup>	individuals must be immediately released when they pose no substantial risk of transmitting a contagious or possibly contagious disease to others. <sup>131</sup>
“[T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.” <sup>132</sup>	“Isolation and quarantine must be by the least restrictive means necessary,” which may include home confinement. <sup>133</sup>
Burger (1) Commitment must be justified by a legitimate state interest <sup>134</sup>	Legitimate state interest is “an occurrence or imminent threat of an illness or health condition that” poses a high probability of a large number of deaths or serious disabilities, or widespread exposure to an agent that poses a significant risk of substantial future harm. <sup>135</sup>
Burger (2): reasons for commitment “must be established in an appropriate proceeding” <sup>136</sup>	Court orders quarantine when a preponderance of evidence shows quarantine is reasonably necessary to prevent the transmission of a contagious disease. <sup>137</sup>
Burger (3): “confinement must cease when those reasons no longer exist” <sup>138</sup>	See 1 <sup>st</sup> entry in this column.

*Addington v. Texas*.<sup>139</sup> The MSEHPA’s “preponderance of the evidence” standard conflicts with *Addington*’s requirement that a burden “equal to or greater than the ‘clear and convincing’” standard is required for civil commitment.<sup>140</sup> The state’s interest in preventing a public outbreak of disease may weigh more heavily than its

<sup>130</sup> *Id.* at 574-76.

<sup>131</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 27-28.

<sup>132</sup> 422 U.S. 563, 574-76 (1975)[get more precise cite].

<sup>133</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 27-28.

<sup>134</sup> 422 U.S. 563, 580 (1975)(Burger, C.J., concurring).

<sup>135</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 11.

<sup>136</sup> 422 U.S. 563, 580 (1975)(Burger, C.J., concurring).

<sup>137</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 30.

<sup>138</sup> 422 U.S. 563, 580 (1975)(Burger, C.J., concurring).

<sup>139</sup> 441 U.S. 418 (1979).

<sup>140</sup> *Id.* at 433.

interest in committing the emotionally disturbed, which would justify a lower burden of proof. This point seems somewhat irrelevant, however, since it could be said of any civil commitment for mental illness in comparison to civil commitment during a public health emergency.

*Vitek v. Jones*.<sup>141</sup> The court in *Vitek* held that the prisoner's interest in not being transferred to a mental hospital warranted procedural safeguards such as notice, counsel, and an adversarial hearing before an independent decisionmaker.<sup>142</sup> Although MSEHPA allows for temporary quarantine without notice, quarantined individuals are entitled to counsel and an adversarial hearing before an independent court under the MSEHPA.<sup>143</sup>

*Youngberg v. Romeo*.<sup>144</sup> The Court in *Romeo* held that Romeo had a constitutional right to safe conditions of confinement, and the right to training "as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints."<sup>145</sup> The MSEHPA provides for quarantine premises that are "safe and hygienic,"<sup>146</sup> as well as medical treatment,<sup>147</sup> which could be analogized to the training which Romeo was entitled for his condition.

*Washington v. Harper*.<sup>148</sup> Analyzed under the due process standard enunciated in *Washington*, the MSEHPA seems to satisfy all facets of due process:

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<sup>141</sup> 445 U.S. 480 (1980).

<sup>142</sup> *Id.* at 496.

<sup>143</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 28-31.

<sup>144</sup> 457 U.S. 307 (1982).

<sup>145</sup> *Id.* at 309.

<sup>146</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 28-31.

<sup>147</sup> *Id.* at 26-27.

<sup>148</sup> 494 U.S. 210 (1990).

<b><i>Washington</i> Holding: Due process adequately addressed by...</b>	<b>MSEHPA</b>
Medical, non-judicial decisionmaker <sup>149</sup>	Judicial decisionmaker <sup>150</sup>
Prisoner not afforded counsel <sup>151</sup>	Quarantined individuals afforded counsel at state expense <sup>152</sup>
“clear, cogent, and convincing” standard of proof was “neither required nor helpful in determining whether to forcibly medicate the prisoner.” <sup>153</sup>	Preponderance of the evidence standard (one step less than clear and convincing) <sup>154</sup> ; quarantined individuals can refuse treatment and face further quarantine <sup>155</sup>

Thus, it appears the MSEHPA meets or exceeds all of *Washington*’s requirements, and meets the requirements of the other four cases with the exception of *Addington*. The degree to which the conflict with *Addington* poses a constitutional problem is potentially lessened by the more conservative membership on today’s Supreme Court, although the MSEHPA would be a stronger document if its standard of proof was “clear and convincing evidence.”

#### Is the MSEHPA Better Than Pre-existing State Law?

The MSEHPA, while not perfect, is vastly preferable to the antiquated laws it replaces. Most pre-MSEHPA state law (1) did not require procedural due process protections<sup>156</sup>; (2) limited the ability of states to collect information necessary to detect and respond to an emerging public health crisis<sup>157</sup>; and (3) did not provide a full range of modern public health powers, such as directly observed therapy, that are critical to

<sup>149</sup> *Id.* at 231.

<sup>150</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 29.

<sup>151</sup> *Washington*, 494 U.S. at 236.

<sup>152</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 31.

<sup>153</sup> *Washington*, 494 U.S. at 235.

<sup>154</sup> *The Model State Emergency Health Powers Act*, *supra* note 79, at 30.

<sup>155</sup> *Id.*, at 26-27.

<sup>156</sup> Gostin, *Public Health Law in an Age of Terrorism*, *supra* note 85, at 85.

<sup>157</sup> *Id.*

modern interventions.<sup>158</sup> In light of the existing deficiencies of state law, the MSEHPA was a giant leap forward in preparation and response to public health emergencies.

### The Proposed Revisions to CDC Quarantine Regulations

In 2005, the CDC proposed the first update to its quarantine regulations in roughly 40 years.<sup>159</sup> These proposed regulations were designed to address three fundamental problems:

First, federal powers apply only to a small number of diseases, depriving the CDC of flexibility to respond to novel threats. For a new threat, the president must issue an executive order making the disease quarantinable, as happened with SARS (severe acute respiratory syndrome) and pandemic influenza. Second, federal rules do not authorize a range of powers, including screening, contact tracing, and directly observed therapy, which may be needed to address certain threats, including XDR-TB. Third, federal quarantine law lacks adequate due process protections because it does not give affected individuals a right to a fair hearing. Given constitutional requirements for an impartial hearing for anyone under civil detention or confinement, including people with TB, federal quarantine powers are arguably unconstitutional.<sup>160</sup>

The new regulations address these problems in a number of ways. They define the term “ill person” to “include those with signs or symptoms commonly associated with quarantinable diseases (e.g., fever, rash, persistent cough, or diarrhea), thus affording CDC greater flexibility.”<sup>161</sup> The proposed regulations also:

would require airlines and other carriers to screen passengers at borders; report cases of illness or death to the CDC; distribute health alert notices to crew and passengers; collect and transmit personal passenger information; order physical examination of exposed persons; and require passengers to disclose information about their contacts, travel itinerary, and medical history. The proposed rules also build more due process

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<sup>158</sup> *Id.*

<sup>159</sup> Department of Health and Human Services, Control of Communicable Diseases (Proposed Rule), 42 CFR Parts 70 and 71 (November 30, 2005).

<sup>160</sup> Markel et al., *Extensively Drug-Resistant Tuberculosis*, *supra* note 77, at 84 (footnotes omitted).

<sup>161</sup> *Id.*

protections into federal quarantine law [such as providing a right to a hearing].<sup>162</sup>

The regulations drew fire for (1) not providing a right to a hearing for up to 3 business days during a “provisional” quarantine; (2) appointing CDC employees as decisionmakers at the hearings, rather than an impartial decisionmaker; (3) imposing tremendous costs on the travel industry to collect and transmit passenger information; and (4) having inadequate privacy protections to safeguard traveler data.<sup>163</sup> As of this writing, the regulations have not been officially adopted, although it is worth noting that CDC officials offered XDR-TB patient Andrew Speaker the option of a hearing.<sup>164</sup> It is possible that the CDC has adopted an unspoken policy of affording due process (in practice) to any persons it may quarantine in the future.

### Conclusion

In conclusion, modern public health challenges from disease and bioterrorism will continue to frame the debate over modernization of quarantine law. Although these debates involve tough choices and trade-offs between liberty and safety, these debates are valuable and extremely necessary. In their absence, this nation could find itself wholly unprepared for the emergencies likely to occur in the twenty-first century.

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<sup>162</sup> *Id.* at 84-85.

<sup>163</sup> *Id.* at 85.

<sup>164</sup> *Id.*